IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5189 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of a1 : NO

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5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT WATER SUPPLY AND SEWERAGE BOARD

Versus

VIRGAR FULGAR GOSWAMI

Appearance:

1. Special Civil Application No. 5189 of 2001

MR HS MUNSHAW for Petitioner No. 1

Mr. Biren A. Vaishnav for MS PARUL P VASAVADA for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Munshaw for the petitioner and Mr. Vaishnav for Ms. Parul Vasavada for

the respondent workman. This petition was admitted by this Court by issuing rule thereon and notice as to interim relief was issued by this court returnable on 14th August, 2001, by order dated 11th July, 2001. No interim relief has been granted in this petition.

By way of this petition, the petitioner has challenged the award of the labour court in reference no. 166 of 1991 dated 7th May, 2001 wherein the labour court has granted reinstatement with continuity of service, with fifty per cent of the back wages for the intervening period with effect from 14th October, 1991.

Learned advocate Mr. Munshaw appearing for the petitioner has submitted that the respondent was not appointed as a regular employee; there is no sanctioned post available; that the petitioner was not selected by the petitioner after following the selection procedure; that there was no permanent post and work available with the petitioner; that the petitioner was given time bound appointment for a specified period subject to availability of the work and as and when the work was not available, his services were being coming to an end automatically and, therefore, provisions of section 2(oo)(bb) of the Industrial Disputes Act, 1947 are attracted and applicable and it does not amount to the retrenchment and, therefore, provisions of section 25-H of the Industrial Disputes Act, 1947 are not applicable to the facts of the present case. Mr. Munshaw has further submitted that at the time of initial entry of the respondent workman, he had already crossed the upper age limit. According to his submission, age limit for such appointment is that one should be of the age of 18 to 25 and since the respondent was not between the said age limit, he is not entitled for reinstatement as a matter of right. He has submitted that the labour court has erred in not appreciating that the provisions of section 2(oo)(bb) are applicable and the respondent was beyond the upper age limit at the time of his initial entry and, thus, the labour court has erred in granting reinstatement with continuity of service with 50 per cent of the back wages. He has also submitted that the respondent was challenging the order of termination dated 16th April, 1985 wherein the matter was referred for adjudication on 14th October, 1991 and, thus, there was delay in raising reference. According to his submissions, this aspect of delay has not been properly considered by the labour court and the labour court ought to have rejected the reference on the ground of delay alone. He has further submitted that no new persons were engaged or employed by the petitioner and, there was no

breach of the provisions of section 25-H of the Industrial Disputes Act, 1947. According to his submission, some persons were engaged and recruited but they were engaged in another different project and, therefore, there was no breach of the provisions of section 25-H of the Act as alleged. However, this aspect has not been properly appreciated by the labour court in its proper perspective and in doing so, the labour court has erred and, therefore, this Court should interfere with such erroneous findings of facts and law in exercise of the powers under Article 226 and/or 227 of the Constitution of India.

On the other hand, learned advocate Mr. Vaishnav appearing for Ms. Vasavada has submitted that before the labour court, the respondent has challenged the termination order dated 16th April, 1985 and the matter was referred for adjudication on 14th October, 1991. He has further submitted that no limitation has been prescribed under the Industrial Disputes Act, 1947 for raising an industrial dispute and, therefore, question of delay can be considered by the labour court at the time of granting relief in favour of the workman concerned but the reference cannot be rejected solely on that ground. According to his submission, the labour court has taken into consideration the aspect of delay in raising dispute while granting relief and the relief has been granted by the labour court accordingly. He has further submitted that before the labour court, the respondent workman has filed affidavit at Exh. 20 which was cross examined by the petitioner and, thereafter, on behalf of the respondent, specific application was given at Exh. 34 whereby the petitioner was called upon to produce the details and documents from the petitioner but no such documents were produced by the petitioner before the labour court and, therefore, the labour court was right in believing the evidence that was produced by the respondent workman in support of the statement of claim filed by him and in absence of such documents controverting the claim of the respondent workman, the labour court was also right in considering and observing that the petitioner has committed breach of section 25-H of the Industrial Disputes Act,1947. He has also submitted that the contention about section 2(oo)(bb) of the Industrial Disputes Act, 1947 has not been raised by the petitioner before the labour court as is evident from the written statement Exh. 12 to the statement of claim filed by the respondent and no such submissions were raised by the petitioner before the labour court. He has submitted that the respondent was selected by the petitioner and thereafter was appointed and thereafter

his services were unlawfully terminated by the petitioner and, therefore, labour court was right in passing the award in question and in doing so, the labour court has not committed any error and, therefore, this Court should not exercise the extra ordinary powers under Article 226 and/or 227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question made by the labour court. As regards contention raised by Mr. Munshaw regarding delay, it is true that the termination is dated 16th April, 1985 which was challenged by the respondent in the year 1991 wherein reference has been made to the labour court by order dated 14th October, 1991. Before the labour court, statement of claim was filed by the petitioner at Exh. 4 and reply thereto was filed by the petitioner at Exh. 12 and thereafter, vide Exh. 15, the respondent has produced certain documents and vide Exh. 16 also, certain documents have been produced by the respondent and thereafter, the respondent was examined vide Exh. 20 and vide Exh. 23, the petitioner has examined Mahendra Raichand. Thereafter, the labour court considered the submissions made by the learned advocates before it and considered the evidence of the petitioner witness at Exh. 23 wherein the said witness Mahendrabhai Raichand has admitted that the respondent was selected by the selection committee and thereafter was appointed as a watchman. In view of this admission made by the witness for the petitioner at Exh. 23, the labour court has further observed to consider whether the respondent is a workman or not within the meaning of section 2(s) of the Act and after considering the definition of the term "workman" as per section 2(s) of the Act, the labour court has come to the conclusion that the respondent is a workman as per section 2(s) of the Act. The labour court has further observed at page 27 (internal page 7) and has considered that the periodical appointments were being given to the respondent and after completion of such periodical appointments, his services were being terminated but the labour court has considered the evidence of the witness for the petitioner at Exh. 23 wherein he has admitted that if any permanent employee or a work charged employee are required to be appointed, their names are required to be sponsored by the Employment Exchange and after such names are sponsored by the Employment Exchange, interviews are being taken. According to his evidence, the respondent was selected by the selection committee and thereafter, he was appointed as such in the scheme which is functioning even today. The labour court has also observed that as regards the

persons who have been selected by the selection committee, then, the Deputy Executive Engineer has no power or authority to terminate services of such persons who have been appointed pursuant to the selection made by the selection committee and in this case, termination order has been passed by the Deputy Executive Engineer. After considering the evidence of the witness for the petitioner at Exh. 23, the labour court has come to the conclusion that if the work has continued and the scheme is operating, then there was no reason for the petitioner to terminate the services of the respondent workman. Further, it is required to be noted that each and every termination is required to be justified by the employer with reason and if the termination is not justified, then, such termination is required to be set aside. In this case also, the labour court was right in appreciating the facts before it and in coming to the conclusion that the petitioner has not justified the termination of the respondent and has rightly observed that in the termination order, no reasons have been assigned by the petitioner. The labour court has also observed that the respondent has remained in service from 2nd November, 1984 to 16th April, 1985 and during that period, he was in continuous service, no doubt, has not completed 240 days but considering the fact that the persons junior to him were retained, the labour court has come to the conclusion that the provisions of section 25-H would apply in such a situation. The labour court has considered application Exh. 3.. submitted for calling details or documents from the petitioner in respect of the names of new employees given by the respondent but no such details were produced or documents were produced by the petitioner before the labour court though there was specific order passed by the labour court to that effect and, therefore, the labour court has drawn adverse inference against the petitioner. According to this Court's opinion, the labour court was right in drawing such adverse inference against the petitioner and in coming to the conclusion that the persons junior to the petitioner namely (1) N.G. Varu; (2) Gagji Haji; (3) K.G. Varu; (4) Khima Malde; (5) S.D. Sisodia; (6) G.B.Chandreshia and (7) Mr. Chauhan were retained by the petitioner while terminating the services of the petitioner. Specific question was asked on behalf of the respondent to the witness for the petitioner at Exh. 23 that these are the workmen who are continued in service and clear answer has not been given as to whether they are continued or not. In written statement also, there was no reply to that effect given by the petitioner and, therefore, the labour court has come to the conclusion that there was breach of section 25-H of the

Industrial Disputes Act, 1947. The labour court has also come to the conclusion that the employees who have been appointed after selection cannot be discharged and their services cannot be terminated by the Deputy Executive Engineer according to the resolution Exh. 31. The labour court has observed that in this case, order of termination was passed by the Deputy Executive Engineer of the petitioner and, therefore, such termination is illegal and thereafter, the labour court has considered the question of back wages and ultimately after considering the evidence of the respondent on record, it has come to the conclusion that the respondent is entitled to be reinstated in service with 50 per cent of the back wages for the intervening period from 14th October, 1991.

I myself have perused the award in question. I have also considered the fact that before the labour court, an application was filed by the respondent at Exh. 34 whereby the respondent called upon the petitioner to produce necessary documents or details about other workmen who are junior working as new recruits with the petitioner. No such documents were produced by the petitioner and no reply to that application was filed by the petitioner and, therefore, considering such approach of the petitioner, the labour court has come to the conclusion that section 25-H has been violated and considering one more aspect that the Deputy Executive Engineer is not empowered to terminate the service of the respondent workman, the labour court has concluded that the termination is illegal on that count also and the order of termination has been considered to be illegal and without jurisdiction. As regards the contention raised by Mr. Munshaw that periodical appointments were given and application of the provisions of section 2(oo)(bb) of the Industrial Disputes Act, 1947, and that the respondent was being engaged subject to availability of work, the labour court has come to the conclusion that the termination of the services of the respondent is without reason and without justification and the labour court has rightly set aside the order of termination and granted reinstatement. So far as the contention about the age bar that the person must be within the age of 18 to 25 at the time of his initial entry and the respondent was of the age of 32 years at the time of his initial entry, it is for the petitioner to consider this aspect at the time of appointing him and considering his age of 32 years at the time of his initial entry, the petitioner should not have allowed the respondent to entry. After issuing order and allowing him to work, now subsequently such contention cannot be raised and it can be said that

such contentions are being raised only with a view to deprive the respondent from claiming his legitimate rights and, therefore, the labour court has rightly considered whether the order of termination of services of the respondent is legal and valid or not and has rightly come to the conclusion that the order of termination is not legal and valid and has not committed any error in making an award of reinstatement in favour of the respondent.

Now the question is about the back wages. Considering the fact that the respondent has been challenging the action of termination of his service of the year 1985 in the year 1991 by raising industrial dispute, considering delay in raising the dispute the labour court has granted back wages only from the date of 14th October, 1991 and in doing so, the labour court has not committed any error. However, according to my opinion, considering the fact that the respondent has completed only six months' service which too was periodical work and his services were terminated by aflux of time, reinstatement has been granted only in view of breach of section 25-H of the Act and further, there was evidence to the effect that the respondent was earning Rs.2000.00 to Rs.2500.00 p.m. by doing miscellaneous work and dispute has been raised after about seven years and, therefore, according to my opinion, the respondent who has not completed 240 days' continuous service and who has raised dispute after seven years' period has been reinstated only on the ground of violation of sec.25-H of the Industrial Disputes Act, 1947 and, therefore, in such case, grant of back wages to the extent of 50 per cent as well as continuity of service is totally unwarranted and contrary to law. IN the facts and circumstances of the case, considering the evidence of the respondent workman about his earning and considering the period for which he has worked, the labour court ought not to have granted continuity of service and back wages. Therefore, the award in question is required to be modified in so far as it relates to continuity of service and 50 per cent of the back wages.

In the result, this petition is partly allowed. The award made by the labour court in reference no. 166 of 1991 dated 7th May, 2001 is modified as under:

The direction issued by the labour court under the impugned award granting reinstatement is not disturbed by this Court and the same shall remain in tact. However, the directions issued by the labour court granting continuity of service and 50 per cent of the

back wages for the intervening period is hereby quashed and set aside. Rule is accordingly made absolute in terms indicated hereinabove with no order as to costs.

16.4.2002. (H.K. Rathod,J.)

Vyas